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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 343

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, APPELLANTS

vs.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED AUGUST 31, 1939

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5 IN UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Petition

Filed May 24, 1939

To the Honorable, the Judges of Said District Court:

Your petitioners, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, bring this action against the United States of America and the Interstate Commerce Commission (hereinafter called the "Commission") for the purpose of enjoining, setting aside, and suspending, in part, a certain order of the Commission, entered April 3, 1939, a proceeding entitled,

"Petition of Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees in Reorganization Proceedings of The
6 Chicago, Rock Island and Pacific Railway Company for authority to lease the properties comprising the Estate of The Chicago, Rock Island and Gulf Railway Company; and of Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, Trustees in Reorganization Proceedings of The Chicago, Rock Island and Gulf Railway Company to grant said lease," being No. 11847 of the Finance Docket of the Commission.

For their cause of action, petitioners state:

1. The Chicago, Rock Island and Pacific Railway Company is a railroad corporation organized under the laws of the States of Illinois and Iowa, respectively, by articles of consolidation dated June 2, 1880, and renewed May 1, 1930. On June 7, 1933, said corporation filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and on the same date said Court entered an order approving said petition as properly filed under said Section 77.

The Chicago, Rock Island and Gulf Railway Company is a railroad corporation organized under the laws of the State of Texas. On October 24, 1933, said corporation filed its petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, alleging that its entire capital stock (except directors' shares) having power to vote for the election of directors was owned by said The Chicago, Rock Island and Pacific Railway Company, and that it desired to effect a plan of reorganization in connection with the plan of reorganization of said The Chicago, Rock Island and Pacific Railway Company. By order entered the same day, said Court approved said petition as properly filed under said Section 77.

On November 22, 1933, said Court entered an order in said
7 reorganization proceedings appointing petitioners as Trustees of all and singular the railroads, lands, properties, estates, rights and franchises, of whatever character and wherever situate, of The Chicago, Rock Island and Pacific Railway Company and of The Chicago, Rock Island and Gulf Railway Company, effective December 1, 1933; by order of said Court entered December 28, 1933, the said appointment was made permanent. Petitioners are now, and have been at all times since December 1, 1933, the duly appointed, qualified and acting Trustees of the Estates of the said railroad corporations, respectively, and as such, are and have been at all times engaged in the transportation of freight and passengers for hire in interstate commerce, subject to the Interstate Commerce Act.

Each of the petitioners is a citizen and resident of the State of Illinois. James E. Gorman and Joseph B. Fleming each reside in the City of Chicago, Illinois.

2. The United States of America is made defendant in this suit pursuant to the provisions of the Act of Congress approved October 22, 1913 (38 Stat. at L. 219), known as "Urgent Deficiencies Appropriation Act."

2. The Commission is an administrative tribunal, created by the Act to Regulate Commerce (24 Stat. at L. 379), approved February 24, 1887, as amended (the Interstate Commerce Act), and is specifically charged with the administration and the enforcement of said Act.

4. On or about October 30, 1937, petitioners filed with the Secretary of the Commission, Washington, D. C., their application to the Commission for authority under par. (4) of Section 5 of the Interstate Commerce Act, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, to lease the properties com-
prising the Estate of The Chicago, Rock Island and Gulf
8 Railway Company, and for authority, as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, to grant said lease, all upon the terms, conditions, and provisions set forth in the draft of lease attached to and made a part of said application. Said application was received and filed by the

Commission and was numbered 11847 on its Finance Docket. Thereafter, on January 19, 1938, the Commission held a hearing at Fort Worth, Texas, upon said application.

5. Said proceeding was thereafter heard by and submitted to Division Four of the Commission, which, by report dated October 29, 1938, found that the proposed lease will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest, upon the terms and conditions proposed in said report (a copy of which is filed herewith, marked "Exhibit A" and made a part hereof). Said report contained the following:

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

6. Thereafter, petitioners sought for and obtained a rehearing and reargument before the entire Commission, and on April 3, 1939, the Commission issued its report and entered an order approving and authorizing said lease, upon the terms and conditions set forth in said lease, but only upon the conditions prescribed in the said report of Division Four of the Commission, dated October 29, 1938, in said proceeding and contained in paragraphs numbered 1, 2, 3, 4, of said report (a copy of which report and order of April 3, 1939, is filed herewith, marked "Exhibit B" and made a part hereof).

7. Petitioners are informed and believe that each and every of the conditions prescribed in said report of Divison Four of the
9 Commission, dated October 29, 1938, and referred to and adopted by the Commission in said order entered April 3, 1939, are void and beyond the power and authority of the Commission to impose. Petoitioners are advised and believe that the Commission is without power or authority to impose conditions of the kind and nature of those prescribed in its said order and is without power, in approving and authorizing a lease of railroad properties by one carrier subject to the Interstate Commerce Act to another carrier likewise subject, to require said carriers, or either of them, to pay money to employees to reimburse them for financial loss, in whole or in part, suffered as a consequence of or arising from the consummation of such lease.

8. Petitioners allege that the subject-matter of the said conditions is not one in respect of commerce, and that said conditions, and the obligations attempted to be imposed thereby upon petitioners, are without the grant of authority to regulate interstate and foreign commerce contained in Article I, Section 8, of the Constitution of the United States. Petitioners further allege that the said conditions and the obligations attempted to be imposed upon petitioners thereby, deprive petitioners of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

9. Petitioners allege that as a result of operation under said lease, there are approximately 53 employees whose positions would be lost or abolished; that if each of such employees retained the status entitling him to a dismissal allowance for the full period of payment and in the full amount prescribed in said conditions, petitioners would be required to pay from the funds of the several Estates
10 of which they are Trustees as aforesaid, on account of such dismissal allowance, not less than the following amounts:

First Year	$61,645
Second Year	59,178
Third Year	59,178
Fourth Year	58,082
Fifth Year	42,675
	$280,758

Petitioners are unable to arrive at an exact estimate of the total cost of compliance with those of said conditions which require, as respects employees who are continued in service after commencement of operation under the said lease, (1) that no such employee be placed in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under the lease; (2) reimbursement for expenses of a transferred employee moving his household and other personal effects, for traveling expenses of himself and immediate family, and his actual wage loss (not exceeding 2 days) while moving; and (3) protection of a transferred employee against any loss suffered in the sale of his home, or in securing cancellation of an unexpired lease of a dwelling occupied by him as a home. Petitioners allege, upon information and belief, that the total cost of compliance with said conditions would be no less than $10,000.

10. Petitioners allege that the said lease and the operation of the railways covered thereby in accordance with the terms thereof will be beneficial to the Estates of which petitioners are Trustees as aforesaid, in that such lease operations will obviate the necessity for expenditures which have been and which must otherwise continue to be made, to an amount in excess of $100,000 per year; that said expenditures are excessive, are not in the public interest, and are a
11 burden upon interstate commerce. That said excessive expenditures are required under the present plan of separate operation of the properties comprising the Estate of The Chicago, Rock Island and Gulf Railway Company in accordance with the laws of the State of Texas. Petitioners desire, therefore, to make and enter into the said lease and to operate the leased properties as therein provided in order to obtain the benefits accruing therefrom to the said Estates. The Interstate Commerce Act provides, by Section 10 thereof, that any trustee acting for a common carrier corporation which is subject to the provisions of Part I of said Act, who shall willfully do or cause to be done, or shall willfully suffer or permit to be done, any act, matter, or thing in said Part I prohibited or

declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in said Part required to be done, or shall be guilty of any infraction of said Part I for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be subject to a fine of not to exceed $5,000 for each offense. That by Sec. 12 of said Part I, the Commission is authorized and required to execute and enforce the provisions of said Part I, and, upon the Commission's request, it is the duty of any district attorney of the United States to whom the Commission may apply, to institute and prosecute all necessary proceedings for the enforcement of the provisions of said Part I and for the punishment for all violations thereof.

The State of Texas, acting by and through its Attorney General, was allowed by the Commission to intervene in said proceeding in said Finance Docket 11847, and appeared at said hearing upon the application therein, and thereafter participated by exceptions, brief, and oral argument in opposition to the granting of the
12 application, contending that the making of the lease and operations thereunder would be contrary to the interests of the State of Texas and to its Constitution and statutes.

The Constitution of the State of Texas, by Article X, Sec. 6, provides:

"No railroad company organized under the laws of this State shall consolidate by private or judicial sale, or otherwise, with any railroad company organized under the laws of any other state or of the United States."

The Statutes of the State of Texas relating to permission to transact business in the State of Texas by any corporation organized or created under the laws of any other State (being Chapter 19 of Vernon's Texas Statutes, 1936), provide:

"ART. 1538. The provisions of this chapter shall not apply to corporations created for the purpose of constructing, building, operating, or maintaining any railway * * *."

Such statutes further provide (Ibid., Title 112—Railroads, Chap. 2, Art. 6278):

"Railroad companies shall keep and maintain at the place within this State where its general offices are located the office of its president, or vice president, secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent, general claim agent; and each one of its general offices shall be so kept and maintained by whatever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where said general offices are required to be located and maintained; and the persons holding said general offices shall

reside at the place and keep and maintain their offices at the place where said general offices are required by law to kept and
13 maintained. If the duties of any of the above-named offices are performed by any person, but his position is called by a different name, said railroad company shall maintain said offices at the place where its general Texas offices are kept and maintained, as required by this chapter. The name of the general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than the one at which it is required to keep its general offices; and each railroad is hereby required to have and maintain its general offices at the place named herein. Where the principal shops of a company are situated on its line in the State, at a place other than where its general offices are located, the superintendent of motive power and machinery, master mechanic, either or both, may have his office and residence at such place where such principal shops are located; provided, that the Railroad Commission of Texas, where it is made to appear that any officer, other than the general officers of any company, can more conveniently perform his duties by residing at some place on the line in Texas other than the place where the general offices are situated, may by an order entered on its record, authorize any such officer to so reside and keep his office at such place.

"ART. 6279. Forfeiture. Each railroad company chartered by this State, or owning, operating, or controlling any line of railroad within this State, which shall violate any provision of this chapter, shall forfeit the charter by which it operates its railroad in Texas to the State of Texas. The Attorney General shall, upon the application of an interested party, or on his own motion, proceed at once against every offending railroad company owning, operating, or controlling any line of railway within this State and violating any provision of this law, by quo warranto to forfeit the charter of such railroad company. In addition to forfeiting the charter to that part of the railroad situated within this State, such offending railroad company shall be subject to a penalty of five thousand dollars for each day it violates any provision of this chapter; such penalty to be recovered by suit in the name of the State of Texas to be
14 filed by the Attorney General. Any money recovered from any railroad company under the provisions of this law shall be paid into the State Treasury and become a part of the available public free school fund. A judgment of the court forfeiting the charter of a railroad company shall allow six months from the date of the judgment within which to comply with this law, and if it shall comply within said time no forfeiture shall occur; but if it fails to so comply, then the judgment shall be final."

Petitioners allege that if said lease is entered into and the leased properties operated pursuant thereto, but without compliance by petitioners with the conditions prescribed in said order of the Commission, petitioners will be exposed to the hazard (1) of having

criminal or civil proceedings instituted against them for violation of the Interstate Commerce Act or for violation of the Commission's said order of April 3, 1939; (2) of the forfeitures and penalties provided for in and by said statutes of the State of Texas for alleged violation thereof; and (3) to numerous actions at law by various persons claiming the benefit of the said conditions, to recover various amounts of money alleged to be due and owing to them, respectively, by virtue of the terms and provisions of said conditions.

11. In the premises, petitioners have no adequate remedy at law, and unless the relief prayed for herein, including the issuance of an interlocutory or temporary injunction be granted herein to petitioners, they will suffer, for the reasons and in the manner stated in this petition, irreparable injury and damage.

Wherefore, your petitioners pray:

1. That a subpoena or subpoenas in chancery issue out of and under the seal of this Honorable Court, directed to the defendants, as required by law, and that due and proper service of such
15 process and of this petition be forthwith made by filing a copy thereof in the office of the Secretary of the Commission, and another copy in the Department of Justice, and that thereby the defendants and each of them be required, on or before a date to be specified in such subpoena or notice, to appear herein and answer this petition, but not under oath, answer under oath being hereby expressly waived.

2. That the defendants, their officers, agents and attorneys, be perpetually restrained and enjoined from enforcing, or attempting to enforce, the said order entered April 3, 1939, by the institution of civil or criminal proceedings against the petitioners by reason of the nonpayment by petitioners, after said lease shall have been entered into by them and operations begun thereunder, of any of the sums designated as compensation, dismissal allowance, reimbursement for moving expenses, losses from sales of homes and cancellation of leases, and any and all other such amounts of whatsoever nature, specified in said conditions.

3. That after final hearing, this Court find, adjudge, order and decree that the part of said order entered April 3, 1939, which adopts, refers to, and incorporates the conditions prescribed in the report of division 4 of the Commission, dated October 29, 1938, and set forth at length in said report in paragraphs numbered 1, 2, 3, and 4 thereof, is, and has at all times been, beyond the lawful authority of the Commission and wholly void, and that the said part be perpetually set aside, suspended and annulled, and the enforcement thereof perpetually enjoined.

4. That a temporary or interlocutory injunction be entered herein, restraining, enjoining, and suspending the enforcement of so much of said order of the Commission as is specified in par. 3, until the further order of this Court.

16 5. That your petitioners may have such other and further relief in the premises as justice and equity may require, and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

FRANK O. LOWDEN,
JAMES E. GORMAN,
JOSEPH B. FLEMING,
Trustees as aforesaid,
By JOSEPH B. FLEMING,
One of said Trustees.

OTIS F. GLENN,
M. L. BELL,
W. F. DICKINSON,
W. F. PETER,
Solicitors for petitioners.
W. F. PETER,
1025 La Salle St. Station, Chicago,
Tel. Wabash 3200.

[*Duly sworn to by Joseph B. Fleming; jurat omitted in printing.*]

17 *Exhibit A to petition*

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 11847. Chicago, Rock Island & Gulf Railway Company Trustees Lease

Submitted June 28, 1938. Decided October 29, 1938

Lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees of the Chicago, Rock Island & Pacific Railway Company, of the properties of the Chicago, Rock Island & Gulf Railway Company, of which they are also trustees, approved and authorized, upon prescribed conditions. Order withheld.

Marcus L. Bell, W. F. Peter, and Robert Harrison for applicants.

William McCraw, Sam Lane, W. M. Hill, James H. Baker, Ed. P. Byars, E. G. Graves, R. B. Young, Horace A. Bacus, J. Y. McLean, Ezra Brainerd, Jr., and Joe T. Steadham for interveners.

REPORT OF THE COMMISSION—DIVISION 4, COMMISSIONERS MEYER, PORTER, AND MAHAFFIE

By Division 4:

Exceptions to the report proposed by the examiner were filed, and oral argument heard.

In Rock Island System Consolidation, 193 I. C. C. 395, decided August 9, 1933, we conditionally found to be in the public interest the merger of the properties of the Chicago, Rock Island and

18 Pacific Railway Company, nine nonoperating subsidiary cor-

porations, and two operating corporations, one of the latter being the Chicago, Rock Island & Gulf Railway Company. The entering of an order was withheld to permit acceptance of the condition imposed, which was not accepted, and the merger was not effected.

On December 31, 1935, Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of the estates of The Chicago, Rock Island and Pacific Railway Company and of The Chicago, Rock Island and Gulf Railway Company, hereinafter sometimes referred to as the Rock Island and the Gulf, respectively, applied under section 5 (4) of the Interstate Commerce Act, as amended, for authority to merge operation of the railway properties included in the two estates. By decision of July 19, 1937, Chicago, R. I. & P. Ry. Co. Trustees Merger of Operation, 221 I. C. C. 611, we held that the application was not within the provisions of section 5 (4) and accordingly dismissed it.

On November 8, 1937, the trustees applied for authority under section 5 (4) to lease the properties of the Gulf and as trustees of the Rock Island to enter into and accept such lease. A hearing has been held. The State of Texas, by its attorney general and its Bureau of Labor Statistics, the city of Fort Worth, commercial interests of that community, the Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees, and the Transportation Brotherhoods (engineers, firemen, conductors, and trainmen) intervened in opposition to the application on the grounds that they will be detrimentally affected by the approval of the lease in that such approval will result in the removal to Chicago,
19 Ill., of a substantial portion of the general offices of the Gulf at Fort Worth, and that such removal would be an indirect violation of articles 6275 and 6276 of the Revised Civil Statutes of Texas, 1925. Individuals constituting a protective committee representing holders of various bond issues of the Rock Island also intervened, but were not represented at the hearing.

The Rock Island owns all of the Gulf's outstanding capital stock and, subject to pledge, all its outstanding bonds. The latter's properties are located entirely in the State of Texas and are separately operated. The Rock Island operates 8,138 miles of railroad and the Gulf 632 miles. The purpose of the lease is to combine the operations of the two carriers. Gulf lines form parts of the Rock Island's through routes as follows: About 91 miles of the route extending from Chicago, Ill., through Kansas City, Mo., to Tucumcari, N. Mex.; about 180 miles of the Memphis-Kansas City, Tucumcari route; and part of the through route from Kansas City to Fort Worth and Dallas, Tex. Train operations are conducted irrespective of State boundary lines. The train operations limited to the State of Texas are said to be very few. No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to trans-

portation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes. Divisions from foreign lines are now settled with both the Rock Island and Gulf, whereas if the Rock Island operates both lines foreign lines will be required to make only one settlement.

The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth.

The applicants show that duplication of accounting could be
20 eliminated in connection with interline and foreign freight, equipment rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dismissal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimated annual saving of $100,000, of which $93,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests but as officers of the Rock Island, and as at present some of them will have jurisdiction of Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved.

The Gulf trustees, subject to the approval of the Commission, propose to lease the Gulf properties to themselves as Rock Island trustees until the termination of the proceedings under section 77 of the Bankruptcy Act of either the Gulf or the Rock Island. The Rock Island is to pay the Gulf as rental for the latter's properties
an amount equal to the net railway operating income derived
21 from the operation by the lessee of the leased properties, as the net railway operating income shall be determined in accordance with the formula attached to the lease; payments are to be made monthly; the lessee is to maintain the property in good and proper condition and operate the lines, and upon termination of the lease to surrender the properties to the lessor, or such person or corporation as shall be entitled thereto, in good order and condition, wear and tear excepted, with such additions and betterments as shall have been made thereto. Provision is made for the adjustment of balances in certain accounts at the termination of the lease, including reimbursement for additions and betterments to the leased premises. The object of the formula is to produce the same net

railway operating income as would have been earned by the Gulf under separate operation. For the year 1937 (December estimated), under separate operation, the net railway operating income of the Gulf is shown as $443,834. On the basis of 1937 revenues, computation of net railway operating income in accordance with the formula, and giving effect to the anticipated savings, produces $469,794.

The net railway operating income of the Rock Island decreased from $3,650,879 in 1932 to a deficit of $1,023,558 in 1935, but increased to $657,437 in 1936 and to $2,503,248 in the first eight months of 1937. The deficits in net income, including fixed charges, but excluding depreciation on equipment, increased from $4,367,280 in 1932 to $10,625,777 in 1935, decreasing to $9,130,566 in 1936 and to $4,124,046 for the first eight months of 1937. The profit and loss account as of August 31, 1937, showed a debit balance of $51,069,135. The net railway operating income of the Gulf for the years 1932–36, and the first eight months of 1937, is shown in order as $397,350, $291,716 deficit, $48,845 deficit, $84,360, $343,244, and $373,997.

22 The deficits in net income, including fixed charges, but excluding depreciation on equipment, were $832,990 in 1932, $1,539,365 in 1933, decreasing to $900,595 in 1936, and to $414,458 for the first eight months of 1937. The profit and loss account as of August 31, 1937, showed a debit balance of $1,098,880. Neither carrier paid any Federal income taxes during the years mentioned except $82.21 by the Gulf in 1932.

In Consolidation of Railroads, 159 I. C. C. 522, the properties of the Gulf and the Rock Island are assigned to System No. 19, Rock Island-Frisco. Inasmuch as the lease is effective only for the period of the trusteeship of either carrier, its approval will not prevent or hinder the carrying out of any portion of the consolidation plan.

On behalf of the protestants it was testified that the removal or dismissal of the employees involved will have a serious effect upon the business of Fort Worth, reducing the volume thereof to the extent of the total salaries of the employees, estimated at $143,000; that the transfer or dismissal of the employees will impose hardships upon them and their families, estimated at 200 persons, and result in those employees losing, either partially or entirely, their investments in property of the estimated value of $175,000, of which about $44,000 is still unpaid; that if the lease be approved it is probable the Rock Island, for a time at least, will lose revenues exceeding the estimated savings; and that Fort Worth businessmen fear that, if the lease be approved, other railroads serving Fort Worth might attempt to follow the same procedure, thereby decreasing railroad employment to the great detriment of the business interests of that city and of the State of Texas.

The protestants contend that the showing of the applicants
23 does not meet the requirements made in Control of Virginian Ry., 117 I. C. C. 67, decided October 11, 1926, wherein on page 85 it is said:

"Applications for authority to acquire control of railroads under the interstate commerce act must be supported by *a clear and strong showing of public gain.* If serious doubt exists regarding the wisdom of the proposed grouping, that doubt must be resolved against the applications. Real and substantial advantages of railroad grouping are capable of reasonable proof. So are the disadvantages. *There must be of record a substantial preponderance of evidence* in favor of an application before we are warranted in giving it favorable consideration." [Italics added.]

This statement was reiterated in Control of Erie R. R. and Pere Marquette Ry., 138 I. C. C. 517, 530, decided May 8, 1928. In the former case, involving application by the Norfolk & Western Railway Company to acquire control by lease of the railroad of the Virginian, the Commission stated that the lease therein involved would result in eliminating existing routes or channels of trade, and all competition between the lines of the two companies. In the second case, involving, among other things, the application of the Chesapeake & Ohio Railroad Company to acquire control of the Erie Railroad Company, by purchase of capital stock, the Commission stated its various objections to the proposed control of the Erie, among them being that acquisition at that time would constitute practically an allocation of an important trunk line in advance of the adoption of any general plan for the formation of competitive systems in Eastern territory, and that there was no exigency in the affairs of either carrier which required action at that time. Since then the Erie has been assigned to System No. 6, Chesapeake & Ohio-Nickel Plate. See Consolidation of Railroads, 159 I. C. C. 522, and 185 I. C. C. 403,
24 decided December 9, 1929, and July 13, 1932, respectively. By decision of December 7, 1937, in New York, C. & St. L. R. Co. and Erie R. Co. Control, 224 I. C. C. 259, we approved and authorized acquisition by the Chesapeake & Ohio of control of the Erie by purchase of capital stock. Approval of the lease now under consideration will not result in the elimination of competition nor have any effect upon rates, nor does it involve the allocation of a property prior to the adoption of the final consolidation plan. Protestants also quote at length from our decision in Acquisition of Illinois Southern Tel. Co., 145 I. C. C. 43, decided June 26, 1928. It is perhaps sufficient to say in regard to that case that it involved an application under section 407 of the Transportation Act, as amended, by a new corporation to acquire the properties of four telephone companies; that there was no physical connection between two of the properties on the one hand and those of the other two, except by toll lines; and that the financing proposed, over which we had no jurisdiction, would increase the securities outstanding in the hands of the public without the addition of any property. None of these features is involved in the case under consideration.

The employees request a finding that the proposed lease will not promote the public interest, or if it be held that it is in the public

interest, a condition be imposed requiring the applicants to provide protection to the employees adversely affected of the nature afforded by the so-called Washington agreement dated May 1, 1936, wherein certain carriers, including the Rock Island, and employee organizations agreed upon allowances to be made to employees affected by joint action of two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by their separate facilities. Under this agreement the Gulf, the Rock Island, and the Peoria Terminal Company are treated as one carrier.

On argument counsel for the clerks suggested for our consideration a condition or conditions providing that employees to be dismissed be entitled to receive one year's salary, and employees who would be required to move from one point on the system to another be entitled to reimbursement of expenses incurred in moving their household effects and dependent members of their families, and that there be no reduction in wages or positions because of the change of location of their places of employment.

There is thus presented for our determination the question whether we have jurisdiction to impose conditions of the nature indicated. The last sentence of section 5 (4) (b) reads as follows:

"If after such hearing the Commission finds that, subject to such terms and conditions *and such modifications as it shall find just and reasonable*, the proposed consolidation, * * *, will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, * * * upon the terms and conditions *and with the modifications so found to be just and reasonable.*" [Italics added.]

In its third supplemental report in Consolidation of Railroads, 185 I. C. C. 493, supra, at page 427, the Commission said:

"In working out the modified plan herein approved, it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress."

In St. Paul Bridge & Term. Ry. Co. Control, 199 I. C. C. 588, decided May 2, 1934, we stated there is no definition in section 5 (4) of the term "public interest"; that the language in that paragraph is broad enough to comprehend every public interest; that since

employees are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operations of the companies by which they are employed is manifest; that it is likewise manifest that theirs is a public interest as well as a private interest, and that (page 596)—

"It is our view that in appropriate cases and where the record before us shows the need based upon considerations of public interest in the broad sense, we may make our findings approving applications under section 5 (4) of the act subject to just and reasonable requirements imposed in the interest of employees of the railways concerned."

In view of the circumstances in that case we concluded the applicant therein should maintain a separate seniority register of the employees of the terminal involved. On argument counsel for the applicants in the proceeding here under consideration stated they are willing to "dovetail" the seniority lists of the Gulf and the Rock Island employees involved if the clerks so desire.

27 In Texas v. United States, 292 U. S. 522, the Supreme Court of the United States held it was within the Commission's power to approve the lease of a line of railroad in Texas to a railroad corporation not incorporated under the laws of Texas even though such approval would result in the removal from the State of various offices and shops of the lessor.

It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will be required to change the place of their employment, as a result of operation under the lease herein considered. Accordingly our authorization will be upon the following conditions:

1. No employee of the trustees of The Chicago, Rock Island and Pacific Railway Company and the trustees of The Chicago, Rock Island and Gulf Railway Company, hereinafter designated as the carriers, who is continued in service shall, for a period of five years from the commencement of operation under the said lease but not beyond the date of termination, as to either carrier, of the reorganization proceedings under section 77 of the Bankruptcy Act, be placed, as a result of operation under said lease, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of operation under said lease, so long as he is unable in the exercise of his seniority rights under existing agreements, rules, and practices, to obtain a position producing compensation equal to or exceeding the compensa-

28 tion of the position held by him at the date of commencement of such operation; that so long as he is unable to obtain a position with said trustees yielding compensation equal to or exceeding his compensation at the time of the commencement of said operation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation of the position in which he is retained and the compensation of the position in which he was displaced, the latter monthly compensation to be considered one-twelfth of the total compensation received by him in the twelve months prior to his displacement, less compensation at the rate of compensation of his retained position for any time lost on account of his voluntary absences, provided, however, that the employee's compensation which it is the purpose of this condition to guarantee shall in no case exceed that which he received in the 12 months prior to his displacement, reduced by any change in wage scales or revision of rules detrimental to the employee, which change or revision is made to affect railroad employees generally; and provided further, that nothing herein shall operate to affect in any respect the retirement on pension or annuity rights and privileges in respect of any of the employees; and provided further, that if any employee elects not to exercise his seniority rights he shall be entitled to no allowance.

2. Any employee of the carriers who is deprived of employment with said carriers, hereinafter designated as a dismissed employee, because of the abolishment of his position or the loss thereof as a result of the exercise of seniority rights by an employee whose position is abolished as a result of operation under said lease, shall be accorded a monthly allowance, designated dismissal allowance, based on length of service (except in the case of an employee with

29 less than one year of service) equivalent to 60 percent of the average monthly compensation of said dismissed employee during the last twelve months of his employment in which he earned compensation prior to the date he is first deprived of employment; that this allowance be made to each eligible employee while unemployed during the period beginning with the date he is deprived of employment and extending in each instance for a length of time determined and limited by the following schedule, but not beyond the date of termination of the bankruptcy proceedings involving either carrier:

1 yr.	and	less	than	2	yrs.	----------	6	months
2 yrs.	"	"	"	3	"	----------	12	"
3 yrs.	"	"	"	5	"	----------	18	"
5 yrs.	"	"	"	10	"	----------	36	"
10 yrs.	"	"	"	15	"	----------	48	"
15 yrs.	and	over				----------	60	"

provided, that a dismissal allowance shall cease prior to the expiration of the prescribed period in the event of failure of the employee without good cause to return to service after being notified by the trustees of a position for which he is eligible, and provided further

that the dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his monthly earnings in such employment and his dismissal allowance exceed the amount upon which his dismissal allowance is based. An employee shall not be regarded as a dismissed employee in case of his resignation, death, retirement on pension, dismissal for good cause, or furlough because of reduction of forces due to seasonal requirements. A dismissal allowance shall cease prior to the expiration of the prescribed period in the event of resignation, death, retirement on pension, or dismissal for good cause.

3. Any employee who is retained in the services of the carriers, or who is restored to service from the group of employees entitled to receive a dismissal allowance, who is required to change the point of his employment as a result of operation under said lease, designated as a transferred employee, and who is required, within one year from the date of commencement of operation under said lease, to move his place of residence, shall be reimbursed for expenses of moving his household and other personal effects, for the traveling expenses of himself and his immediate family, and his own actual wage loss, not to exceed two days, the exact extent of the responsibility of the carriers to be agreed upon in advance by the said carriers and the employee affected, provided, however, that changes in places of residence subsequent to the initial change caused by the operation under said lease and which result from the exercise of seniority rights shall not be considered within the foregoing provision.

4. Any transferred employee who owns his home, or an equity therein, shall be protected against any loss suffered in the sale thereof, within one year of the effective date of operation under said lease, for not less than its fair value, said fair value to be determined as of a date 30 days prior to the filing of the application in this proceeding by the carrier, and such fair value to be agreed upon by the carriers and each employee prior to such sale; and if any transferred employee holds an unexpired lease of a dwelling occupied by him as a home, the carriers shall protect him from loss and cost in securing cancellation of his said lease.

The carriers and the employees should be able to agree upon rules and procedure to make effective the intent of the foregoing conditions, such intent being to prevent, for the designated periods, reduction in salaries of retained employees, to provide an allowance for employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and to reimburse transferred employees for expenses and losses incurred in connection with the transfer of their place of residence made necessary because of the operation under said lease.

Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island

and Pacific Railway Company and of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest.

No order will be entered approving and authorizing the least pending notice to us that the applicants accept the foregoing conditions.

MAHAFFIE, Commissioner, dissenting in part:

In the finding, insofar as it approves the lease in question, I concur. There can be no doubt on this record that the proposal of the trustees will promote the public interest. It meets fully the test approved by the Supreme Court in a similar case, *Texas* v. *United States*, 292 U. S. 522, 531:

"The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—
is that of the controlling public interest. And that term as
32 used in the statute is not a mere general reference to public
welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'"

I am unable, however, to agree that affirmative action based on that finding should be deferred pending the acceptance by applicants of the conditions sought to be imposed by the majority relating to the pay and expenses of the trustees' employees.

As a Commission we exercise authority delegated to us by a statute. Had Congress intended that we have jurisdiction over the compensation and expenses of railroad employes it easily could have so provided. In the absence of such a provision in specific language I do not think it proper that we attempt, by construction, to regulate conditions of employment as an incident to the exercise of power that clearly is conferred on us.

We have called the attention of the Congress to our lack of jurisdiction adequately to protect employees from financial loss or other inconvenience as a consequence of authorized railway unifications found to be in the public interest. Our recommendation in that regard has been before the Congress since 1935. The subject matter of the conditions here imposed has been before the Congress in various forms since our recommendation but no such legislation has been enacted. Other means have been, and are now being, employed by the Federal government specifically to deal with the conditions of carrier employment. Our jurisdiction has not been changed. Possibly this is due to a belief that such matters as here are attempted to be controlled as a condition of our approval can be handled better by direct negotiations between the parties concerned.

33 Conditions imposed beyond our statutory authority are of no effect. United States v. Chicago, M., St. P. & P. R. Co., 282 U. S. 311, 331. If we possessed definite statutory authority to impose, in connection with our approval, such conditions as are here required to be accepted by the trustees before we take final action on this application, there would be no need to defer action. We could at once enter a final order making them effective. If conditions are valid no acceptance is necessary. It may, I think, be assumed that doubt as to our power furnishes the only reason for bargaining with the applicants as to acceptance.

I do not here consider the conditions in terms. Had we jurisdiction over such matters of social welfare we well might make them more comprehensive. I think it a bad and dangerous policy for a Commission, such as this, to undertake to regulate matters of social welfare without clear statutory authority. Such a policy can lead only to confusion and misunderstanding.

By the Commission, division 4.

[SEAL] W. P. BARTEL, *Secretary.*

34 *Exhibit B to petition*

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 11847. Chicago, Rock Island & Gulf Railway Company Trustees Lease

Submitted March 1, 1939. Decided April 3, 1939

Report of division 4 herein, 230 I. C. C. 181, approving and authorizing, upon prescribed conditions, lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees of the Chicago, Rock Island & Pacific Railway Company, of the properties of the Chicago, Rock Island & Gulf Railway Company, of which they are also trustees, modified to provide for entering of an order subject to the prescribed conditions.

Appearances as noted in previous report, and Otis F. Glenn for applicants, and R. W. Fairchild for interveners.

REPORT OF THE COMMISSION ON REARGUMENT

By the Commission:

This proceeding under section 5 (4) of the Interstate Commerce Act involves the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings under section 77 of the Bankruptcy Act, as amended, of The Chicago, Rock Island and Pacific Railway Company, of the
35 properties of The Chicago, Rock Island and Gulf Railway Company, all in the State of Texas, of which they are also

trustees, until the termination of the bankruptcy proceedings involving either carrier.

In its report of October 29, 1938, in this proceeding, 230 I. C. C. 181, referred to as the previous report, division 4 found that, subject to prescribed conditions which will be referred to below, the proposed lease will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, but withheld the entering of an order pending notice of the applicants' acceptance of the conditions imposed. The case has been reargued before us.

In the report it is stated that operation by the Chicago, Rock Island & Pacific, referred to hereinafter as the Rock Island, under the proposed lease will not impose upon the public any conditions pertaining to the transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect on rates or routes. On the basis of their present business, the trustees estimate they can accomplish an annual saving of $100,000 under the proposed operation by the elimination of the duplicate accounting now necessary, of which saving $6,000 or $7,000 will accrue to the Chicago, Rock Island & Gulf, hereinafter referred to as the Gulf, and the remainder to the Rock Island. Testimony is that this saving is to be brought about by the transfer of 20 employees from Fort Worth to the Rock Island's accounting offices at Chicago, and the dismissal of 49 other employees now at Fort Worth, unless business increases sufficiently to warrant the retention of a greater number of employees. No savings can be effected except by the proposed reduction of forces. On argument before
36 division 4 on June 28, 1938, counsel for the applicants stated that the 20 employees mentioned would be retained at Fort Worth for the present, probably five years.

The division held that the duplicate accounting necessary under the present plan of operating the two properties requires excessive expenditures which are not in the public interest and which are a burden on interstate and foreign commerce. It approved and authorized the proposed lease upon four stated conditions, which need not be repeated, designed for the protection of employees who would be required to accept reduced compensation, those who would be dismissed, and those who would be required to change their places of residence to other points on the system, and suggested that the carriers and the employees should be able to agree upon rules and procedure to make effective the intent of those conditions.

The Rock Island is organized under the laws of the States of Iowa and Illinois. The Gulf is incorporated under the laws of the State of Texas, and its operations are confined to that State, with the exception of about a mile in Oklahoma. The Rock Island owns all the Gulf's outstanding capital stock, and, subject to pledge, all its outstanding bonds. The financial results of their operations are set forth in the previous report, as is also a description of train opera-

tions. In Consolidation of Railroads, 159 I. C. C. 522, we assigned the properties of both carriers to system No. 19, Rock Island-Frisco. The laws of Texas require that railroad corporations operating within that State shall be incorporated and shall maintain their general offices and shops therein. In Texas v. United States, 292 U. S. 522, the Supreme Court of the United States sustained our power to approve the lease of a line of railroad in Texas to a
37 railroad corporation not incorporated under the laws of that State, even though such approval would result in the removal from the State of various offices and shops of the lessor.

Counsel for the State and the city of Fort Worth suggest that the court did not hold that we may not consider State laws in determining whether or not a proposal of this character is in the public interest, and contend, in effect, that depriving the State of effective control of the Gulf, which will be the result of approval of the lease, is not in the public interest for the reason that such approval would be contrary to the views or desires of the citizens of Texas as expressed in their laws. This contention would be entitled to serious consideration if, in the disposition of the lease herein involved, we could legally disregard lines of railroad operated by the Rock Island in 13 other States. The contention is also made that the showing of the applicants does not warrant approval of the lease, and that there has not been a full, fair, and complete disclosure by the applicants of attendant disadvantages to them and to the public.

We think that the controlling facts are correctly set forth in the previous report, and that the proposal of the applicants is clearly within the following language in Texas *v.* United States, supra, pages 530 and 531:

"These broadening provisions of the Emergency Railroad Transportation Act, 1933, [section 5 (4a and b) of the Interstate Commerce Act] confirm and carry forward the purpose which led to the enactment of Transportation Act, 1920. (Title IV, 41 Stat. 474, *et seq.*). We found that Transportation Act, 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obliga-
38 tions, new machinery, were created. [Citations omitted.] It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Citations omitted.] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. New York Central Securities Corp. v. United States, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and pur-

pose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. * * *'"

The applicants contend that the conditions as to employees relate to a subject matter over which we have no jurisdiction, and that the withholding of the order is an interlocutory disposition of the case without legal warrant and in conflict with the provisions of the act. It is their view that unless we issue an order they cannot test our jurisdiction in proceedings before the courts, and they ask that, if we think we have jurisdiction to impose conditions of the nature prescribed, an order containing those conditions be entered.

Whatever authority we have to approve the lease herein proposed, subject to the conditions imposed by division 4, is delegated to us in the last sentence of section 5 (4) (b), which reads as follows:

"If after such hearing the Commission finds that, subject to such terms and conditions *and such modifications as it shall find just and reasonable*, the proposed consolidation, * * *, will be in
39 harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, * * * upon the terms and conditions *and with the modifications so found to be just and reasonable*." [Italics added.]

The question before us, therefore, is whether those conditions are just and reasonable modifications of the terms and conditions of the proposed lease in the public interest.

In our third supplemental report in Consolidation of Railroads, decided July 13, 1932, 185 I. C. C. 403, at page 487 we said:

"In working out the modified plan herein approved, it is expected that carriers will give careful consideration to the interests of their employees with the view of avoiding the imposition of undue hardships upon them in connection with the relocation and consolidation of shops and offices. When applications under section 5 of the act may be filed for our approval, the applicants will be expected to deal adequately with these questions and, to the extent necessary and warranted by the record, we will consider the imposition of such conditions as we may find to be proper and within our jurisdiction. If any doubt exists as to our jurisdiction in the premises it should be safeguarded by Congress."

In St. Paul Bridge & Term. Ry. Co. Control, 199 I. C. C. 588, decided May 2, 1934, division 4 stated there is no definition in section 5 (4) of the term "public interest"; that the language in that paragraph is broad enough to comprehend every public interest and the interest of every group or element of the public; that since employees are important elements of the railway transportation industry and of the communities in which railways operate, their interest in changes in management, ownership, or operations of the

40 companies by which they are employed is manifest; that it is likewise manifest that theirs is a public interest as well as a private interest, and that (page 596):

"It is our view that in appropriate cases and where the record before us shows the need based upon considerations of public interest in the broad sense, we may make our findings approving applications under section 5 (4) of the act subject to just and reasonable requirements imposed in the interest of employees of the railways concerned."

In view of the circumstances in that case division 4 concluded the applicant therein should maintain a separate seniority register of the employees of the terminal involved. The applicants in the proceeding here under consideration stated they are willing to "dovetail" the seniority lists of the Gulf and the Rock Island employees involved if the clerks so desire.

We have not heretofore had occasion to consider the report in the above case as to the imposition of conditions, except in connection with a proceeding involving an application under section 1 (18–20) of the act, Chicago, G. W. R. Co. Trackage, 207 I. C. C. 315, wherein, at page 322, we pointed out that our power to impose conditions under section 5 (4) is stated in terms different from those in section 1 (18–20). In Associated Rys. Co. Acquisition and Securities, 228 I. C. C. 277, 336, we cited with approval the conclusion of the division that the interest of the employees in changes of management, etc., of companies by which they are employed is a public as well as a private interest.

We have heretofore urged that there is need for carriers to do everything that can be done to make railroad service attractive to the public and to improve earnings through reduction of operating costs. The proposal now before us is to reduce operating

41 expenses, and contemplates an "avoidance of waste." The saving will be a continuing one, and accomplished wholly by reduction of the payrolls. The question arises whether a requirement that it be shared for a time with the employees at whose expense it will be brought about is just and reasonable within the meaning of the act. The applicants contend that the conditions impose upon them what might be termed duplicate costs, in that although they have paid taxes under the Social Security Act and will have to continue to do so under the Railroad Unemployment Act, which they say is intended, among other things, to cover unemployment caused by proposals of this nature, they will be required by us to make payments out of their own funds to the employees financially adversely affected by the elimination of the Gulf's accounting department at Fort Worth. We doubt that the foregoing legislation can be considered as circumscribing our authority under the Interstate Commerce Act.

The language of section 5 (4) (b) is broad, and, as we view it, the only limitation is that any conditions we impose must be in

the public interest. Manifestly it would be impossible, because of the many and changing situations which arise in proceedings under section 5 (4), for Congress to undertake to grant specific jurisdiction to impose a particular condition or conditions in the public interest. We concur in the finding of division 4 in St. Paul Bridge & Term. Ry. Co. Control, supra, that the welfare of the employees affected is one of the matters of public interest which we must consider in proceedings under section 5 (4), and, therefore, are of the opinion that the conditions imposed in the proceeding herein involved are proper and relate to a subject matter within
42 our jurisdiction. We are not attempting to exercise jurisdiction to regulate employment, nor the compensation of employees, nor their expenses. We are simply attempting in the public interest reasonably to protect those employees of the applicants who may be adversely affected economically by the grant of authority herein against unavoidable but unreasonable and unjust burdens which are not in the public interest. Accordingly, the finding of division 4 in that regard should be, and it is, affirmed.

The only other question in this case is whether it is within our power to withhold the entering of an order until the applicants agree to accept the conditions. This practice is one which we have followed for some time. It is not necessary to cite all the various cases. Among the earlier ones were New York Central Unification, 150 I. C. C. 278 and 154 I. C. C. 489, and Missouri Pac. R. Co. Unification, 166 I. C. C. 154 and 175 I. C. C. 26. The last one, by division 4, was New York, C. & St. L. R. Co. and Erie R. Co. Control, 224 I. C. C. 259. It seems to us that it must be conceded we have power to determine the procedure necessary to make our findings effective. However, we have no inclination to decide this case in such a manner as in the opinion of the applicants would make it impossible for them to secure a review of our conclusions by the courts.

Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and
43 conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date.

EASTMAN, Commissioner, concurring:

While I think there is reasonable doubt whether in approving this lease we have power, as the law now stands, to attach a condition for the protection of the railroad employees who may be adversely

affected thereby, such protection is desirable and in the public interest and I believe that the Commission is justified in resolving the doubt in favor of the condition. Division 4 proposed to withhold the entering of an order until the applicants agreed to accept the condition. In objecting to this, I think applicants were on sound ground in the circumstances, but this method of dealing with the matter has now been changed and applicants are given an order, subject to the condition, which they can test in court, if they so desire.

With respect to this matter there has been much ado about very little, it seems to me. The protection of the employees for which the condition provides is substantially the same in character as the protection to which the great majority of the railroads agreed in May 1936, after prolonged negotiations with representatives of the employees, and that agreement is still outstanding. Furthermore, the so-called Committee of Six, which included three railroad executives, in their report to the President on December 23, 1938, with respect to the transportation problem, recommended that the Federal agency passing upon railroad consolidations "require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the said employees"; and I understand that the
44 recommendations of the Committee of Six have been approved by the directors of the Association of American Railroads. This does not mean that either the Committee or the Association took the position that the Commission now has the power to attach such a condition under the present law, but it does mean that the condition which we have imposed is one which they believe that we ought to have clear authority to impose and which they also believe to be in accord with sound public policy.

CASKIE, Chairman, dissenting in part:

I concur in the conclusion that the lease here considered will promote the public interest within the meaning of that term as used in section 5 (4) (b) of the act and as interpreted by the Supreme Court in a similar case, Texas v. United States, 292 U. S. 522, 531.

I regret that I am unable to join in the further conclusion of the majority that we are empowered by that section to impose conditions for the protection of employees who will be adversely affected by the lease. I am fully sympathetic with the humanitarian efforts of the majority to protect in these times of widespread unemployment the employees at whose expense the operating economies here proposed will be made. In my opinion, however, neither the section of the act under which we are asked to approve the lease nor any other provision thereof authorizes us to prescribe these conditions, notwithstanding that they are inherently just and reasonable. Had Congress intended to invest us with that authority, it would have expressed that intention in definite and unequivocal language. Our jurisdiction is strictly statutory and can not be extended by implication.

45 Until now a like opinion evidently has been held by the majority. In our annual reports to the Congress for 1935 and 1936, for example, we specifically recommended that further statutory provisions be enacted to protect employees from undue financial loss as a consequence of authorized railway unifications found to be in the interest of the general public or otherwise lawfully effected. Congress has amended the interstate commerce act in other respects but has made no change in this respect in section 5 (4) since we first submitted that recommendation. The assumption of authority here to prescribe these conditions obviously is inconsistent with that recommendation. Only recently, in our report in Railway Exp. Agency, Inc., Pooling Application, 227 I. C. C. 517, we found, with respect to the pooling and division of earnings agreement there considered under section 5 (1) of the act, that the imposition of conditions in respect of the rates of pay and rules governing employment of joint express and railroad agents is a matter not within our jurisdiction.

MAHAFFIE, Commissioner, dissenting in part:

For the reasons stated in my dissent from the original report herein, 230 I. C. C. 181, 190, I am unable to agree that we have been given jurisdiction to regulate carrier employment or the compensation and expenses of carrier employees.

I am authorized to state that Commissioners Lee and Miller concur in this expression.

Commissioner Aitchison did not participate in the disposition of this case.

46 ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 3rd day of April, A. D. 1939.

FINANCE DOCKET No. 11847. CHICAGO, ROCK ISLAND & GULF RAILWAY COMPANY TRUSTEES LEASE

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said Commission having, on the date hereof, made and filed a report on reargument containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees, referred to in the application and report aforesaid, upon the terms and conditions proposed and upon the conditions prescribed in the report of division 4 of this Commission, dated October 29, 1938, in this proceeding be, and it is hereby, approved and authorized.

It is further ordered, That within 10 days after the execution thereof, the said trustees shall file with this Commission a certified copy of said lease as executed.

It is further ordered, That the said trustees of The Chicago,
47 Rock Island and Pacific Railway Company, when filing and adopting schedules establishing rates and fares applicable on the properties leased, shall in such schedules refer to this order by title, date, and docket number.

And it is further ordered, That this order shall take effect and be in force from and after 40 days from its date.

By the Commission.

[SEAL] W. P. BARTEL, *Secretary.*

50 In United States District Court

[Title omitted.]

Answer of United States of America

Filed June 23, 1939

United States of America, one of the respondents in the above entitled action, for answer to the petition filed therein against it, answers and says:

I

United States admits the truth of the facts alleged in the opening paragraph and paragraphs numbered 1, 2, 3, 4, 5, and 6, inclusive, of the petition.

II

United States denies the matters, things, and conclusions alleged in paragraphs numbered 7, 8, and 9 of petition.

III

Answering paragraph numbered 10 of the petition, United States denies that the matters and things alleged in the first three sentences of said paragraph are within the jurisdiction of this Court and alleges that said matters are within the exclusive jurisdiction of the Interstate Commerce Commission. Answering the remaining allegations of said paragraph 10, United States admits that the Interstate Commerce Act and the Constitution of the State of Texas and the statutes of that State contain the provisions mentioned in said paragraph 10.

51 IV

Answering paragraph 11 of petition, United States admits that petitioners have no remedy at law against the order, or any part

thereof, of the Interstate Commerce Commission described in the petition, but United States denies that petitioners will suffer irreparable injury or damage or any other legal injury if the relief prayed in the petition is not granted.

V

Further answering the petition, and more particularly paragraph 10 thereof, United States alleges that said order of the Interstate Commerce Commission merely approves and authorizes the lease therein described, upon the terms and conditions set forth by the Commission; but the order does not command, direct, or compel petitioners to exercise or execute the authority thereby granted; and United States further alleges that there is no provision of law or penalty enforceable against petitioners for failure or refusal to exercise or execute the authority conferred upon them by said order; but United States admits that petitioners are without authority lawfully to avail themselves of and to exercise the authority conferred by said order to execute the lease therein described without also complying with the terms and conditions attached to and made a part of the authorization contained in said order.

VI

Further answering the petition, United States denies that this Court has power or jurisdiction to annul and enjoin the terms and conditions prescribed by said order without simultaneously enjoining and annulling the entire order as made and entered by said Commission; and United States further denies that said terms and conditions may be separated from or dealt with separately from the order as a whole, as made and entered by the Commission; and United States further denies that this Court has power or jurisdiction to grant the relief prayed by the petition.

52 Wherefore, having fully answered, United States prays that the relief sought by the petition be denied and that the petition be dismissed at the cost of the petitioners, and that it have the benefit of such other and further orders, decrees, or relief as may be just and proper.

ELMER B. COLLINS,
Elmer B. Collins,
Special Assistant to the Attorney General.

WILLIAM J. CAMPBELL,
William J. Campbell,
United States Attorney.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.

54 In United States District Court

[Title omitted.]

Answer of the Interstate Commerce Commission

Filed June 22, 1939

The Interstate Commerce Commission, hereinafter called the Commission, one of the defendants in the above-entitled action, answers and says:

I

Answering paragraphs 1 to 4, inclusive, of the petition, the Commission admits, for the purposes of this suit, that the allegations therein contained are true, with the exception that the Commission alleges that the application referred to in paragraph 4 as having been filed on or about October 30, 1937, was in fact filed on November 8, 1937.

55 II

Answering paragraph 5 of the petition, the Commission admits the issuance by it of the report therein referred to, dated October 29, 1938, but for more full and complete information concerning the contents of said report, the Commission respectfully refers the Court to said report, attached to and made a part of the petition as Exhibit A.

III

Answering paragraph 6 of the petition, the Commission admits the issuance by it of the report therein referred to, dated April 3, 1939, but for more full and complete information concerning the contents of said report, the Commission respectfully refers the Court to said report, attached to and made a part of the petition as Exhibit B.

IV

Answering paragraphs 7 and 8 of the petition, the Commission denies the allegations therein contained.

V

Answering paragraph 9 of the petition, the Commission disclaims information sufficient to form a belief as to the truth of the allegations contained therein, but insofar as such allegations conflict with statements contained in the Commission's reports, or either of them, the Commission denies the truth of such allegations.

56

VI

Answering the first sentence of paragraph 10 of the petition, the Commission avers that the allegations contained therein, as to said lease being beneficial; as to the expenditures referred to therein as being excessive, not in the public interest and a burden on interstate commerce, are all questions for the exclusive determination of the Interstate Commerce Commission in passing upon the question whether the approval of the lease sought by plaintiffs should be granted or denied.

Further answering the second sentence of paragraph 10 of the petition, the Commission admits that expenditures are required under the present plan of separate operation of the properties comprising the Chicago, Rock Island & Gulf Railway Company in accordance with the laws of the State of Texas.

Further answering paragraph 10 of the petition, the Commission admits that the Interstate Commerce Act and the Constitution of the State of Texas and statutes of that State, contain the provisions mentioned in said paragraph.

VII

Answering paragraph 11 of the petition, the Commission denies that petitioners will suffer irreparable injury or damage or any other injury or damage if the relief prayed in the petition is not granted.

57

VIII

Further answering the petition, the Commission alleges that said order of April 3, 1939, with the condition attached, now sought to be set aside, merely approves and authorizes the lease therein described, which approval and authorization was sought in an application filed by petitioners herein; that such approval and authorization was granted by the Commission after the full hearing provided for in the Interstate Commerce Act; that at the hearing upon the application therein, a large volume of testimony and other evidence bearing upon the subject matter of the petition was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of petitioners by their counsel; that in briefs filed in said proceeding and in oral argument questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties by their respective counsel, and that the Commission determined said matters and entered and served upon the petitioners and other interested parties its said report and order approving and authorizing the lease therein described, but only upon the terms and conditions set forth therein by the Commission. The Commission further avers that said order does not command, direct, or compel petitioners to exercise or execute the authority thereby granted; and that if petitioners

are dissatisfied with the terms and conditions as contained in the Commission's order, they are free to disregard the lease in its
58 entirely, but the Commission alleges that petitioners are without authority to avail themselves of and to exercise the authority conferred by the Commission in said report and order of April 3, 1939, without also complying with the terms and conditions attached to and made a part of the authorization contained in said order.

IX

Further answering the allegations of the petition, the Commission alleges that this Court has no jurisdiction to grant the relief sought by petitioners, because if this Court were to annul and set aside the conditions attached by the Commission in its administrative judgment to the order authorizing the lease, the Court would be substituting its judgment for that of the Commission and would be approving the lease upon terms and conditions different from those deemed by the Commission necessary to protect the public interest.

Wherefore, having fully answered, the Commission prays that the relief sought by the petition be denied and that the petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By E. M. REIDY,
Assistant Chief Counsel.

DANIEL W. KNOWLTON,
Chief Counsel, Of Counsel.

59 [*Duly sworn to by Claude R. Porter; jurat omitted in printing.*]

61 In United States District Court

[Title omitted.]

Affidavit of W. H. Burns

Filed July 12, 1939

W. H. Burns, being first duly sworn on oath, deposes and says that he is now, and has been since December 1, 1933, General Auditor, with offices at Chicago, Illinois, for the Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company. That prior to December 1, 1933, affiant was Vice President and General Auditor of The Chicago, Rock Island and Pacific Railway Company, and has been in the Acounting Department of which he is now head, for more than 50 years. That he is now and for many years past has been familiar with the accounting methods employed on the Rock Island railroad system, including the accounting for The Chicago, Rock Island and Gulf Railway Company and its Trustees.

Affiant is the same W. H. Burns who appeared and testified as a witness for applicants at the hearing at Fort Worth, Texas, on

January 19, 1938, held by the Interstate Commerce Commis-
62 sion in the proceeding known as application of Trustees of The Chicago, Rock Island and Pacific Railway Company to lease properties of The Chicago, Rock Island and Gulf Railway Company, Finance Docket 11847. That he prepared the testimony and exhibits introduced at said hearing relative to the nature and the amount of savings that could be made by said applicants and would result from unified operations under the proposed leased involved in that proceeding.

Affiant has prepared an estimate of the maximum amounts that said applicant Trustees would have to pay as dismissal allowances, pursuant to the requirements of the report and order of the Interstate Commerce Commission in said proceeding, dated April 3, 1939, to employes of the Trustees of The Chicago, Rock Island and Gulf Railway Company in the offices of the Auditor and Sub-District Accountant at Fort Worth, Texas, in consequence of loss of their positions resulting from unified operations under the proposed lease. Said estimate is based on a study of the volume and requirements of the accounting work that would have to be performed under such unified operation and the resulting number of present employes would not be retained, their length of service, and average monthly compensation during the past 12 months, all ascertained and computed as nearly as may be in accordance with the dismissal allowance conditions prescribed by the Commission in its said report. That affiant estimates that there will be a total of 53 Accounting Department positions abolished, and 53 employes affected, in consequence of such unified operations under the propgsed lease. That the statement attached hereto shows the estimated maximum amounts
of the dismissal allowances to be paid said 53 employes, as
63 computed by affiant as aforesaid; and the matters and things contained therein are true and complete according to affiant's best knowledge and ability.

Affiant is unable to make an exact estimate of the total cost to applicants of compliance with the other conditions set forth in said order, with respect to compensation, moving expenses, and losses suffered from the sale of homes or cancellation of unexpired leases of employes who will be retained in applicants' service, but affiant verily believes, and so states, that there will be not less than 17 retained employes who will be affected in respect of the matters referred to, and that the cost to applicants of complying with said last-mentioned conditions will be not less than $10,000.

W. H. BURNS.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me, a Notary Public in and for the county aforesaid, this 11th day of July 1939.

[SEAL] T. A. GRAHAM,
Notary Public.

64 *Exhibit to affidavit*

Length of service	Months allowed by order	Positions abolished	100% monthly salary	60% monthly salary	Annual payments under order					5-year total
					1st year	2nd year	3rd year	4th year	5th year	
15 years and over	60	35	$3,927.15	$3,556.29	$42,675	$42,675	$42,675	$42,675	$42,675	$213,375
10 years and less than 15	48	13	2,139.85	1,283.91	15,407	15,407	15,407	15,407	.....	61,628
5 years and less than 10	36	1	152.25	91.35	1,097	1,097	1,096	.....	.....	3,288
3 years and less than 5	18	.....	.....	.....	.....	.....	.....	.....	.....	.....
2 years and less than 3	12	3	308.45	185.07	2,221	.....	.....	.....	.....	2,221
1 year and less than 2	6	1	68.25	40.95	246	.....	.....	.....	.....	246
Total	.....	53	$8,595.95	$5,157.57	$61,645	$59,179	$59,178	$58,082	$42,675	$280,758

66 In United States District Court

[Title omitted.]

Findings of fact and conclusions of law

July 31, 1939

The Court hereby adopts the following

FINDINGS OF FACT

1. On November 8, 1937, petitioners filed with the Interstate Commerce Commission their application for authority under paragraph (4) of Section 5 of the Interstate Commerce Act of the Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company to lease the railways and properties of The Chicago, Rock Island and Gulf Railway Company, a corporation organized and existing under the laws of the State of Texas, upon the terms, conditions, and provisions set forth in the draft of lease submitted as part of the application. Said application was received by the Commission and given No. 11847, on its Finance Docket.

2. On January 19, 1938, the Commission held a hearing upon said application at Fort Worth, Texas, upon notice duly given as
67 required by law. Said proceeding was thereafter heard by and submitted to Division 4 of the Commission, which thereafter issued its report dated October 29, 1938, in which it found:

"Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company and of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest.

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

3. Said report of Division 4 dated October 29, 1938, also contains the following findings:

"No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes."

And again:

"The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth. The applicants show that duplication of accounting could be eliminated in connection with interline and foreign freight, equipment rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dismissal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimated annual saving of $100,000, of which $6,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office
68 rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests but as officers of t Rock Island, and as at present some of them will have jurisdiction f Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved."

And again:

"In Consolidation of Railroads, 159 I. C. C. 522, the properties of the Gulf and the Rock Island are assigned to System No. 19, Rock Island-Frisco. Inasmuch as the lease is effective only for the period of the trusteeship of either carrier, its approval will not prevent or hinder the carrying out of any portion of the consolidation plan."

And again:

"It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will be required to change the place of their employment as a result of operation under the lease herein considered."

The foregoing and other facts found by Division 4 were affirmed by the entire Commission.

4. Thereafter, petitioners sought for and had a reconsideration and reargument before the entire Commission. On April 3, 1939, the Commission issued its report and entered an order approving and authorizing said lease, upon the terms and conditions set forth in the draft of lease submitted with the application, but only upon the conditions prescribed in said report of Division 4 in said proceeding, which conditions it incorporated in its order by reference.

5. Said conditions are contained in paragraphs numbered 1, 2, 3, and 4 of said report of Division 4 of October 29, 1938, and may be thus summarized:

69 Retained Employes

(a) No employe of either party to the lease shall, for 5 years after lease operation begins, be placed, as a result of lease operations, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of lease operations, as long as he is unable in the exercise of seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at such date of commencement; as long as he is unable to obtain such equal compensation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation actually received under lease operations and monthly compensation of the position in which he was displaced.

(b) If required to change the point of his employment as the result of lease operation, and if required thereby within one year from commencement thereof to move his place of residence, he shall be reimbursed for expense of moving his household effects and traveling expenses of himself and immediate family; also his actual wage loss, not exceeding two days.

(c) Any employe shall be protected against any loss suffered in the sale of his home within one year of the effective date of lease operations, for not less than its fair value; or against loss in securing the

cancellation of an unexpired lease of a dwelling house occupied as a home by such employe.

Dismissed Employes

(a) Any employe who is dismissed because his position is abolished or because he loses it by exercise of seniority rights by an employe whose position is abolished as a result of lease operation, shall be accorded a monthly allowance while deprived of employment, equal to 60% of his average monthly compensation during the last 12 months of his employment. The period of such monthly allowance is as follows:

Length of service:	Period of employment
1 yr. and less than 2 yrs.	6 months
2 yrs. " " " 3 yrs.	12 "
3 yrs. " " " 5 yrs.	18 "
5 yrs. " " " 10 yrs.	36 "
10 yrs. " " " 15 yrs.	48 "
15 yrs. and over	60 "

The dismissal allowance ceases prior to the expiration of the prescribed period in the event of certain contingencies; and is subject to reduction in the case of employment elsewhere, if monthly earnings plus dismissal allowance exceed his former railroad pay.

70 The foregoing conditions are supplemented and amplified by various incidental provisions, such as that the payments required shall cease in any event upon the termination, as to either carrier, of the reorganization proceedings.

6. Said report of the entire Commission of April 3, 1939, contains the following:

"Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date."

7. The case came on for hearing before this Court on July 12, 1939, at which time petitioners introduced in evidence the affidavit of W. H. Burns, General Auditor for the petitioners, which stated that there are approximately 53 employes of petitioners whose positions would be lost or abolished in consequence of operation under the approved lease; that if each of said employes shall retain the status entitling him to a dismissal allowance for the full period of payment and in the full amount prescribed in said conditions, peti-

tioners would be required to pay on account of such dismissal allowances not less than the following amounts:

First year	$61,645
Second year	59,178
Third year	59,178
Fourth year	58,082
Fifth year	42,675
	$280,758

Said affidavit further states that according to affiant's belief the cost to petitioners of complying with the other of said conditions will be not less than $10,000.

71 8. There is no issue of fact or law presented by the pleadings in this case except the questions (a) of the Commission's legal power to impose the conditions contained in said report of Division 4 and adopted by the entire Commission in its report and order of April 3, 1939; and (b) the power of this Court to grant the prayer of the petition that the conditions be annulled and enjoined without enjoining and annulling the entire order.

Based on the facts of record herein, the Court makes and adopts the following

CONCLUSIONS OF LAW

1. That the conditions referred to in, and made a part of, the order of the Interstate Commerce Commission dated April 3, 1939, are beyond the power of the Interstate Commerce Commission to impose, and are illegal and void.

2. That the petitioners herein are entitled to an order enjoining, setting aside, annulling, and suspending that part of said order of the Interstate Commerce Commission dated April 3, 1939, which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants, their officers, agents, and attorneys, from enforcing, or attempting to enforce, that part of said order.

3. This Court has jurisdiction of the subject matter and of the parties to this suit, and has power, under the provisions of the

72 Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220, to enjoin, annul, and set aside said conditions without enjoining, annulling, or setting aside said order in its entirety.

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
F. RYAN DUFFY,
United States District Judge.

74 In United States District Court for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Suit by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of The Chicago, Rock Island and Gulf Railway Company against the United States and the Interstate Commerce Commission for an order enjoining, setting aside, and annulling a part of the order of the Interstate Commerce Commission dated April 3, 1939, which imposed certain conditions upon the Plaintiffs.

Opinion

Filed July 31, 1939

Before Evans, Circuit Judge, Woodward, District Judge, and Duffy, District Judge.

PER CURIAM: The Chicago, Rock Island and Pacific Railway Company, comprising 8,138 miles of railroad (hereinafter referred to as the "Pacific Company"), and The Chicago, Rock Island and Gulf Company, comprising 652 miles of railroad (hereinafter
75 referred to as the "Gulf Company"), are both in bankruptcy for the purpose of reorganization under Section 77 of the Bankruptcy Act. The plaintiffs were appointed Trustees of both properties. The Pacific Company owns all of the capital stock apd the bonds of the Gulf Company. Notwithstanding the separate organization, the Gulf Company is a component part of the Rock Island System.

On November 8, 1937, the petitioners, who are plaintiffs herein, filed with the Interstate Commerce Commission an application for authority under paragraph (4) of Section 5 of the Interstate Commerce Act to lease the railway and properties of the Gulf Company. Hearings were had by the Commission, and Division Four thereof issued its report dated October 29, 1938, in which it was found:

"Subject to the foregoing conditions, we find that the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company and of the properties of The

Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of the Commission's plan for the consolidation of railroad properties, and will promote the public interest.

"No order will be entered approving and authorizing the lease pending notice to us that the applicants accept the foregoing conditions."

Said findings further stated:

"No change in train operations is herein involved. Operation by the Rock Island under the proposed lease will not impose upon the public any conditions pertaining to transportation of freight different from those now in effect, will result in no change in service to the public, and will have no effect upon rates or routes."

76 The findings also contained the following provision:

"The only change which will be effected, if the lease be approved, will be in the accounting department of the Gulf at Fort Worth. The applicants show that duplication of accounting could be eliminated in connection with interline and foreign freight, equipment, rents and repairs, purchase of company material, pay rolls, and to a minor extent in connection with passenger traffic, and that unified operation as proposed would permit discontinuance of the compilation of separate statistics and the making of separate reports. This change would be brought about by the transfer of 20 employees from Fort Worth to the accounting department of the Rock Island at Chicago, and the dismissal of 49 employees, unless business increased sufficiently to warrant the retention of a greater number of men, resulting in an estimate annual saving of $100,000, of which $6,000 or $7,000 would accrue to the Gulf and the remainder to the Rock Island. On argument counsel for the applicants stated that since the hearing in this case, it has been determined that the 20 employees referred to will be retained at Fort Worth for the present. The estimate does not include a possible saving of $5,925 for office rent at Fort Worth, which is dependent upon whether the vacated office space can be sublet. The general officers of the Gulf will continue to represent Rock Island interests but as officers of the Rock Island, and as at present some of them will have jurisdiction of Rock Island lines outside of the State of Texas. The testimony is that no saving could be effected except by the dismissal and transfer of employees involved."

The following finding also was made:

"It is clear from the record that the duplicate accounting now necessary under the present plan of operating the properties of the applicants requires excessive expenditures not in the public interest and which are a burden on interstate and foreign commerce. We are of the opinion, however, that provision should be made for the protection of the employees who will be forced to accept positions at reduced compensation, or who will be dismissed, or who will be

required to change the place of their employment, as a result of operation under the lease herein considered."

77 The entire Commission affirmed the findings of Division Four.

Petitioners obtained a reargument before the entire Commission, and on April 3, 1939, the Commission issued its report and entered an order authorizing said lease, but only upon conditions which may be summarized as follows:

"Retained employes

"(a) No employee of either party to the lease shall, for 5 years after lease operation begins, be placed, as a result of lease operations, in a worse position with respect to compensation and rules governing working conditions than he occupied at the date of commencement of lease operations, as long as he is unable in the exercise of seniority rights, to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at such date of commencement; as long as he is unable to obtain such equal compensation, he shall be entitled to a monthly allowance equal to the difference between the monthly compensation actually received under lease operations and monthly compensation of the position in which he was displaced.

"(b) If required to change the point of his employment as the result of lease operation, and if required thereby within one year from commencement thereof to move his place of residence, he shall be reimbursed for expense of moving his household effects and traveling expenses of himself and immediate family; also his actual wage loss, not exceeding two days.

"(c) Any employee shall be protected against any loss suffered in the sale of his home within one year of the effective date of lease operations, for not less than its fair value; or against loss in securing the cancellation of an unexpired lease of a dwelling house occupied as a home by such employe.

78 "Dismissed employes

"(a) Any employe who is dismissed because his position is abolished or because he loses it by exercise of seniority rights by an employe whose position is abolished as a result of lease operation, shall be accorded a monthly allowance while deprived of employment, equal to 60% of his average monthly compensation during the last 12 months of his employment. The period of such monthly allowance is as follows:

"Length of Service:	*Period of payment*
1 yr. and less than 2 yrs.	6 months.
2 yrs. " " " 3 yrs.	12 "
3 yrs. " " " 5 yrs.	18 "
5 yrs. " " " 10 yrs.	36 "
10 yrs. " " " 15 yrs.	48 "
15 yrs. and over	60 "

"The dismissal allowance ceases prior to the expiration of the prescribed period in the event of certain contingencies; and is subject to reduction in the case of employment elsewhere, if monthly earnings plus dismissal allowances exceed his former railroad pay."

The report of the entire Commission also contained the following provisions:

"Accordingly, we find that, subject to the conditions prescribed in the previous report herein dated October 29, 1938, the proposed lease by Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, trustees in reorganization proceedings of The Chicago, Rock Island and Pacific Railway Company, of the properties of The Chicago, Rock Island and Gulf Railway Company, of which they are also trustees in reorganization proceedings, upon the terms and conditions proposed, will be in harmony with and in furtherance of our plan for the consolidation of railroad properties, and will promote the public interest, and we will enter an appropriate order, effective 40 days from its date."

Proof was made at the hearing before this Court that approximately 53 employes would lose their positions under the proposed lease; and that, should the conditions as to dismissed employes be carried out, the cost to the petitioners would be approximately $280,758 over a period of five years, and that compliance with the other conditions would cost the petitioners not less than $10,000.

There are no issues of fact involved, and the sole question to be determined is whether the Interstate Commerce Commission had the legal power to impose the conditions contained in the report of its Division Four and adopted by the entire Commission in its report and order of April 3, 1939.

It is fundamental that the Commission can only exercise the authority legally delegated to it by Congress. U. S. v. Penn. R. Co., 242 U. S. 208.

The statutory authority relied on is Section 5 (4) of the Interstate Commerce Act:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b), for two or more carriers * * * to lease * * * the properties, or any part thereof, of another.

"(b) If after such hearing, the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraphs (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

79 It is urged by the defendants that under the provision "and will promote the public interest," the Commission was within

its legal powers in imposing the conditions hereinbefore stated. There can be no question but that the conditions imposed by the Commission were very desirable from the standpoint of social welfare. However, our inquiry must be confined to a consideration of whether the Commission possessed the power and authority which it attempted to exercise.

This court feels bound by the interpretation of the phrase "and will promote the public interest" which the Supreme Court has heretofore given when it considered same in connection with the Interstate Commerce Act.

In the case of New York Central Securities Company vs. United States, 287 U. S. 12, the Supreme Court, in an opinion by Chief Justice Hughes, considered the words "public interest" and stated:

"The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

80 In the case of Texas, et al., vs. United States, 292 U. S. 522, the court said:

"The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'" New York Central Securities Corp. v. United States, supra.

In the case of Schechter Corporation vs. United States, 295 U. S. 405, the court commented upon the powers which Congress had given to the Interstate Commerce Commission, and said (p. 540):

"When the Commission is authorized to issue, for the construction, extension, or abandonment of lines, a certificate of 'public convenience and necessity,' or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest,' we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation."

In the case of West vs. P. B. & W. R. Company (Md.), 141 Atl. 509, the Railway Company desired to relocate its tracks and applied to the Public Service Commission of Maryland for its approval.

The Commission attached a proviso fixing the minimum grade for the new line which was different than the grade desired by the
81 railroad. The Commission justified the condition imposed on the ground that the grade desired by the railroad would injure the adjacent property by obstructing the view, lessening light and air, etc. The court stated (p. 515):

"These quotations fairly reflect the purpose and scope of the entire statute, and it is manifest from an examination of it, as well as of them, that the public interest which is committed to the protection of the commission is the interest which the public has in the operation of the railroads in such a manner as to furnish efficient service at reasonable rates, and that the power of the commission over railroad companies lies within those limits,"

and at (p. 516) stated further:

"But the 'public' referred to in that section obviously means the whole public, and not a particular part of it owning property contiguous to the railroad * * *."

Under the repeated interpretation of our Supreme Court, it is clear that Congress has not delegated to the Commission the power to impose conditions which have to do with the private employer-employee relationship, by reason of the phrase "will promote the public interest."

It is persuasive, although not controlling, that the Commission itself had grave doubts as to their authority to impose said conditions. The Commission divided six to four and, in addition, Commissioner Eastman, one of the majority, stated in his concurring opinion:

"While I think there is reasonable doubt whether, in approving this lease, we have power, as the law now stands, to attach a condition for the protection of the railroad employes who may be adversely affected thereby, such protection is desirable and in the public interest * * *."

82 Furthermore, in reports which the Commission made to Congress for the years 1935 and 1936, there were recommendations for further statutory provisions to protect employes from undue financial loss as a consequence of authorized railway unifications. Although Congress has amended the Interstate Commerce Act in other respects, it has made no change in paragraph (4) of Section 5.

The conditions which were made a part of the order of the Commission, dated April 3, 1939, are beyond the power of the Interstate Commerce Commission to impose and are illegal and void; and the petitioners are entitled to an order enjoining, setting aside, annulling, and suspending that part of the order which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants from enforcing or attempting to enforce that part of the order.

There can be no question that this court has jurisdiction of the subject matter and of the parties to this suit, and has the power under

the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Statutes at Large 220, to enjoin, annul, and set aside said conditions without enjoining, annulling, or setting aside said order in its entirety.

We desire to emphasize, however, that nothing contained
83 in this opinion shall be construed as passing upon the validity of said order of the Interstate Commerce Commission, dated April 3, 1939, with said conditions annulled and set aside.

EVAN A. EVANS,
United States Circuit Judge.

CHARLES E. WOODWARD,
United States District Judge.

F. RYAN DUFFY,
United States District Judge.

85 In United States District Court for the Northern District of Illinois, Eastern Division

No. 615

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY AND AS TRUSTEES OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND GULF RAILWAY COMPANY, PLAINTIFFS

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Final decree

July 21, 1939

This cause having come on for final hearing on July 12, 1939, upon the petition, the several answers of the defendants, and the affidavit of W. H. Burns, which was offered by petitioners, and the Court having heard arguments of counsel, and having this day filed its findings of fact and conclusions of law, and now being fully advised in the premises, it is

Ordered, adjudged, and decreed:

1. That that part of said order of the Interstate Commerce Commission dated April 3, 1939, which consists of said conditions referred to in said findings of fact of the Court herein be, and the same is hereby, annulled and set aside.

2. That the defendants, their officers, agents, and attorneys,
86 be and they are hereby perpetually restrained and enjoined from enforcing, or attempting to enforce, that part of said order referred to in paragraph 1 hereof against the petitioners herein.

3. Nothing herein contained shall be construed as passing upon the validity of the said order of the Interstate Commerce Commission, dated April 3, 1939, with said conditions annulled and set aside.

Enter:

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
F. RYAN DUFFY,
United States District Judge.

JULY 21, 1939.

88 In United States District Court

[Title omitted.]

Petition for appeal

Filed August 28th, 1939

To the Honorable Judges of the United States District Court for the Northern District of Illinois, Eastern Division:

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled case, feeling themselves aggrieved by the final decree entered by this Court on July 21, 1939, pray an appeal from said decree to the Supreme Court of the United States, in accordance with the statutory requirements.

The particulars wherein they consider the decree erroneous are set forth in the assignment of errors accompanying this petition, and to which reference is hereby made.

89 Said defendants pray that a transcript of the record, proceedings, and papers on which said decree was made and entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMOND ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

a

91 In United States District Court

[Title omitted.]

Notice of appeal

Filed August 28th, 1939

To Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company and as Trustees of the Estate of The Chicago, Rock Island and Gulf Railway Company, Plaintiffs:

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, the United States of America and the Inerstate Commerce Commission, defendants in the above-entitled case, and each of them, do hereby appeal to the Supreme Court of the United States from the final order and decree of the United States District Court for the Northern District of Illinois,
92 Eastern Division, made and entered on the 21st day of July 1939, which set aside, annulled, suspended, and permanently enjoined conditions attached to a certain order of the Interstate Commerce Commission in the proceeding entitled "Finance Docket No. 11847, Chicago, Rock Island and Gulf Railway Company Trustees Lease," dated April 3, 1939, wherein the Commission authorized the Trustees of the Rock Island to lease, upon certain prescribed conditions, the properties of the Chicago, Rock Island and Gulf.

Attached hereto is a copy of the petition for appeal and the order allowing the appeal, the assignments of error and the statement as to jurisdiction. Your attention is further directed to the provisions of Rule 12, paragraphs 2 and 3, which provide:

"2. If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorporated by him in the transcript of record prepared for this court upon the appeal.

"3. Within 15 days after such service the appellee may file with the clerk of the court possessed of the record, and serve upon the appellant, a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in, or filed with, such opposing statement, a motion by appellee to dismiss or affirm. Where such a

motion is made, it may be opposed as provided in Rule 7, paragraph 3."

93 Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMOND ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby acknowledged this 28th day of August 1939.

W. F. PETER,
Counsel for Plaintiffs.

95 In United States District Court

[Title omitted.]

Assignment of errors

Filed August 28th, 1939

Now come the United States and the Interstate Commerce Commission, defendants in the above-entitled cause, by their respective counsel and in connection with their appeal, file the following assignments of error upon which they will rely in the prosecution of their appeal to the Supreme Court of the United States from the final decree of this Court entered July 21, 1939.

The District Court erred:

96 (1) In holding and deciding that the conditions referred to in, and made a part of, the order of the Interstate Commerce Commission dated October 29, 1938, and affirmed by the entire Commission on April 3, 1939, are beyond the power of said Commission to impose, and are illegal and void.

(2) In holding and deciding that the plaintiffs are entitled to an order enjoining, setting aside, annulling, and suspending that part of said order of the Interstate Commerce Commission of October 29, 1938, as affirmed by order dated April 3, 1939, which refers to and consists of said conditions, and perpetually restraining and enjoining the defendants, their officers, agents, and attorneys, from enforcing, or attempting to enforce, that part of said order.

(3) In holding and deciding that it had power, under the provisions of the Urgent Deficiencies Act of October 22, 1913, Chapter 32, 38 Stat. L. 220, to enjoin, annul, and set aside conditions attached

to the Commission's order involved in this case, without enjoining, annulling, or setting aside said order in its entirety.

(4) In that, in setting aside the conditions imposed by the Commission and attached to its order, which conditions the Commission found necessary and desirable to promote the public interest, the Court acted beyond its power because it usurped a function of
97 the Commission, substituted its judgment for that of the Commission upon an administrative matter, and in effect approved the lease of one railroad by another upon terms and conditions different from those found necessary by the Commission.

(5) In not dismissing the petition at plantiffs' costs.

Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMOND ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

99 In United States District Court

[Title omitted.]

Order allowing appeal

August 28, 1939

In the above-entitled cause, the United States of America and the Interstate Commerce Commission, defendants, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this Court entered July 21, 1939, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of Court in such case made and provided, it is

100 Ordered and decreed that the appeal be, and the same is hereby, allowed as prayed for.

Dated August 28, 1939.

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.

_____,
United States District Judge.

102 In United States District Court

[Title omitted.]

Notice to the Attorney General of the State of Illinois

Filed August 28, 1939

To the Honorable JOHN CASSIDY,
Attorney General of the State of Illinois:

Pursuant to the Urgent Deficiencies Act of October 22, 1913, 38 Stat. L. 221, you are hereby notified that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled cause, have taken an appeal to the Supreme Court of the United States from the final decree of the United States
103 District Court for the Northern District of Illinois, Eastern Division, entered July 21, 1939, and the order allowing the appeal makes the same returnable within forty days from the date thereof.

Dated August 25, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMAN ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

Service of the foregoing notice to the Attorney General of the State of Illinois, and the receipt of a copy thereof, are hereby acknowledged this 25th day of August 1939.

JOHN E. CASSIDY,
Attorney General, State of Illinois.

114 In United States District Court

[Title omitted.]

Petition for order staying final decree pending appeal

Filed August 28, 1939

To the Honorable Evan A. Evans, United States Circuit Judge, Charles E. Woodward, and F. Ryan Duffy, United States District Judges:

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled case, respectfully move that

this Court enter an order staying the judgment or final decree entered in this cause, pending the determination of their appeal from said decree to the Supreme Court of the United States, and show as grounds therefor:

1. On July 21, 1939, this Court entered its final decree annulling and setting aside that part of the order of the Interstate Commerce Commission issued April 3, 1939, which consists of the conditions referred to in the Court's findings of fact, and perpetually enjoining and restraining these defendants and their officers and employees from enforcing or attempting to enforce that part of said order.

115 2. The Commission's said order authorized, subject to the four conditions set forth in its report, the Trustees of the Chicago, Rock Island & Pacific Railway Company to lease the railway and properties of the Chicago, Rock Island & Gulf Railway Company, pending the reorganization of either of said companies, both of which are now involved in reorganization proceedings under Section 77 of the Bankruptcy Act, the plaintiffs being the trustees of both companies. Said conditions prevent, during prescribed periods, reductions in salaries of plaintiffs' employees who are retained after the lease becomes effective, require the Trustees to pay an allowance to employees who are dismissed as a result of operation under the lease and who are unable to secure other employment, and to reimburse transferred employees for expenses and losses incurred in connection with the transfer of their place of residence made necessary because of the operation under the lease.

3. These defendants, exercising the right conferred by Urgent Deficiencies Act (38 Stat. 219, U. S. Code, Sup. III, Title 28, Sec. 45a) have taken a direct appeal, allowed by order of this court entered August 28, 1939, to the Supreme Court of the United States from said final decree of July 21, 1939. That Act provides that "appeal to the Supreme Court, however, shall in no case supersede or stay the judgment ordered of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and in such amount as the Supreme Court or the justice of that court allowing the stay, may require." The Supreme Court has held that application for a stay pending appeal under that Act should be presented first to the judges of the district court who have heard the case. Virginia Railway Company v. United States, 272 U. S. 658.

4. Said decree, in annulling and enjoining the conditions attached to the Commission's order and expressly declining to decide whether the authority to execute the lease constitutes a valid and legal act of authorization by the Commission after this Court's annulment of the terms and conditions upon which that authority was granted, leaves the plaintiffs free to proceed now with the execution of

116 the lease and immediately to abandon or discontinue the Fort Worth accounting office of the Gulf Company and discharge the employees of that office, without regard to the conditions prescribed by the Commission's order.

5. The Trustees have informed these defendants, by letter dated August 9, 1939, to Joseph B. Eastman, Chairman of the Interstate Commerce Commission, that they will so consummate the lease and place it in effect on September 1, 1939, and these defendants believe and allege that the Trustees will proceed accordingly unless an order is entered staying this Court's final decree and restraining the Trustees from so consummating the lease.

6. Unless restrained by order of Court, the Trustees will so proceed with the execution of the lease before the Supreme Court can hear and determine the appeal, and one of the questions of great public importance which the appeal presents, namely, whether the Commission's certificate or order, after annulment of the conditions enjoined and deleted by this Court's decree, constitutes a valid order or authorization within the meaning of the Interstate Commerce Act (Sec. 5 (4)), might be held to have become moot, in which event these defendants will have been deprived of their statutory right to a review and decision of that question by the Supreme Court.

7. Unless an order issues staying the decree of this Court pending appeal, the only effective remedy available to these defendants will be the institution of a suit for injunction, under section 5 (13) of the Interstate Commerce Act, to restrain the Trustees from executing the lease, on the ground that, since this Court has annulled the conditions which were an integral part of the Commission's order, the Trustees are without any authority to consummate the lease and will violate said Act by so doing. An order staying this Court's decree pending appeal will avoid the necessity of such suit in this Court, and will result in a final and expedited decision by the Supreme Court upon the same question which this Court would have to decide in such suit, and which undoubtedly would ultimately go to the Supreme Court for final decision.

117 8. Unless this Court's decree is stayed pending appeal the Trustees will proceed to place the lease in effect on September 1, 1939, and dismiss and discharge more than fifty employees of the Fort Worth accounting office without complying with said conditions so prescribed by the Commission. Therefore, said dismissed and discharged employees and consequently these defendants and the public interest, as embodied in said order, which it is their duty to protect and which said order seeks to protect, will suffer great and irreparable damage, of the nature and to the extent set forth in the Commission's report and order, during the pendency of the appeal before the Supreme Court, should that Court reverse the decree of this Court.

9. The Act invoked by the complaint in this case not only provides for the issuance of a stay order for the purpose of maintaining the status quo pending appeal, but it also makes the issuance of such stay order essential to the maintenance of the status quo pending appeal.

Wherefore, defendants pray that this Court enter an order staying, pending the appeal to the Supreme Court, the final decree entered in this cause on July 21, 1939, and restraining and preventing the plaintiffs from placing said lease into effect or otherwise changing the status quo of the matter involved in said order of the Commission, during the pendency of the appeal before the Supreme Court.

WILLIAM J. CAMPBELL,
United States Attorney.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
E. M. REIDY,
Assistant Chief Counsel,
Interstate Commerce Commission.

THURMAN ARNOLD,
Thurman Arnold,
Assistant Attorney General.
D. W. KNOWLTON,
D. W. Knowlton,
Chief Counsel, Interstate Commerce Commission.

119 In United States District Court

[Title omitted.]

Plaintiff's answer to petition for order staying final decree pending appeal

Filed August 28, 1939

For answer to defendants' petition for order staying final decree pending appeal, plaintiffs herein allege:

1. They admit the allegations of paragraphs 1 and 2 of the petition.

2. Answering paragraph 3 of the petition: plaintiffs have no information concerning the taking of an appeal by defendants from the final decree in this cause to the Supreme Court of the United States, and have not been served with notice thereof, or citation. Plaintiffs allege that said final decree is reviewable only by the Supreme Court of the United States, pursuant to Judicial Code,
120 Section 210 (U. S. C. A. Sec. 47 (a)). Said section provides:

"Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct," etc.

Plaintiffs allege that under the terms of said statute, this Court has no jurisdiction to stay said final decree pending appeal. And plain-

tiffs deny that the Supreme Court has held that a district court has such power with respect to final decrees entered by a three-judge court, enjoining, setting aside, annulling, or suspending an order of the Interstate Commerce Commission. The Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to Act of Congress of June 19, 1934, Chapter 651, effective September 16, 1938, provide:

"Rule 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

"(g) POWER OF APPELLATE COURT NOT LIMITED.—The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, Sec. 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

3. Plaintiffs admit the allegations of paragraphs 4 and 5 of the petition.

4. Plaintiffs deny that the consummation of the proposed lease during the pendency of an appeal to the Supreme Court
121 from said final decree herein will render moot the question whether the Commission's order, after annulment of the conditions enjoined and set aside by said final decree, constitutes a valid order or authorization of the Commission; and deny that the defendants would thereby be deprived of their right to a review and decision of that question by the Supreme Court.

5. Plaintiffs deny the allegations of paragraph 7 of the petition.

6. Plaintiffs deny the allegations of paragraph 8 of the petition and deny that either the defendants or the dismissed and discharged employes will suffer any damage whatsoever in case said final decree is not stayed pending appeal; if said lease is consummated, a reversal of said final decree without a stay order having been granted, will simply result in the obligation of plaintiffs to pay said employes such sums as shall have accrued and be due to them, respectively, in accordance with the conditions prescribed in said order of the Interstate Commerce Commission, and said amounts, being an obligation of plaintiff Trustees, are entitled to preference and priority in the administration of the Estates of which plaintiffs are Trustees, pursuant to the requirements of Section 64 of the Bankruptcy Act.

7. Answering paragraph 9 of the petition: plaintiffs admit that the Statute provides for the issuance of a stay order, but only in case the Supreme Court or a justice thereof shall so direct.

122 8. Further answering, plaintiffs allege that even if this Court should hold that it has jurisdiction to issue a stay

order in this case, no such stay order should be issued for the reason that the same would be improper under the facts and circumstances of the particular case and that this Court would not be warranted in the exercise of discretion under such circumstances in issuing the stay order prayed for. This for the following reasons:

(a) No injury, irreparable or otherwise, can result to defendants and to such employes who may be dismissed or otherwise affected by the consummation of the lease, in the event said final decree is reversed. In case of such reversal, plaintiffs would be obligated to pay whatever sums may have accrued and be due and owing to said employes, respectively, from the date of consummation of said lease to the date of such reversal.

(b) During the period January 1, 1936, to July 1, 1939, plaintiffs paid the Unemployment Tax pursuant to Title IX of the Social Security Act; and beginning July 1, 1939, have paid the Unemployment Tax (being 3% on plaintiffs' total payroll amount) under the Statute which became effective on that date, known as Railroad Unemployment Tax Act. Plaintiffs' employes who may lose their positions as a result of the consummation of said lease will be entitled to the benefits of unemployment insurance payments provided for in said statute, with the result that such employes will not suffer total cessation of income pending the appeal herein, even though no stay order is issued.

(c) If said stay order be granted plaintiffs will suffer great and irreparable injury and damage in the event said final degree is affirmed on appeal, in that they must either (1) forego the consummation of the lease and the benefit of the savings therefrom (approximately $9,000 per month), or (2) make the payments to employes as specified by the Commission's order. If said decree be affirmed plaintiffs cannot recoup themselves for either such loss in savings or for the amount so paid to employes. Nor can they recoup themselves from either of the defendants herein for the reason that neither the United States nor the Interstate Commerce Commission is required to give any bond, obligation, or other security in connection with the stay of decree.

123 (d) It does not appear that this Court entertains a serious doubt as to the correctness of its own decision, or that the decision depends upon a question of law on which there is conflict among the courts, and it affirmatively appears that there is no special reason why the order of the Commission should not become operative until its validity can be heard and determined by the Supreme Court.

Wherefore plaintiffs pray that said motion be denied.

OTIS F. GLENN,
M. L. BELL,
W. F. PETER,
Counsel for Plaintiffs.

125 In United States District Court

[Title omitted.]

Order staying final decree pending appeal

August 28, 1939

Upon the entering of the final decree in this cause came counsel for defendants, United States and Interstate Commerce Commission, and filed petition for an order staying the final decree of this Court, pending their appeal therefrom to the Supreme Court of the United States.

The Court having heard and considered the facts and arguments presented by the parties upon said petition, and it appearing that this Court has on August 28, 1939, allowed an appeal by the defendants to the Supreme Court of the United States from said final decree, that the appeal presents important questions concerning which there is doubt and which should be reviewed by the Supreme Court of the United States, and that great and irreparable injury and detriment to the defendants and to plaintiffs' employees concerned will ensue if said final decree is not stayed pending appeal; and it further appearing to the Court that the status quo should be preserved pending the appeal to the Supreme Court;

126 It is therefore ordered that the enforcement, operation, and execution against defendants, United States of America and Interstate Commerce Commission, their officers or agents, or any of them, of said final decree of this Court dated July 21, 1939, be, and it is hereby, stayed and suspended during the pendency and until the determination of the appeal in this cause by the Supreme Court of the United States; and the plaintiffs are hereby enjoined and restrained from changing in any manner the status quo of the matter involved in this cause, pending said appeal. This order is entered with the understanding that this appeal shall be presented to the Supreme Court at the 1939 October Term and that on or before October 20, 1939, appellant applies to the Supreme Court for an order advancing the cause on the October 1939 Calendar.

Further ordered that plaintiffs may, at any time, apply to the United States Supreme Court, or a Justice thereof, for an order modifying or vacating this order.

EVAN A. EVANS,
United States Circuit Judge.
CHARLES E. WOODWARD,
United States District Judge.
_____,
United States District Judge.

AUGUST 28, 1939.

128 In United States District Court

[Title omitted.]

Praecipe for transcript of record

Filed August 28, 1939

To the Clerk:

You will please prepare a transcript of the record in the above-entitled cause to be transmitted to the Supreme Court of the United States pursuant to the appeal of said Court heretofore filed and allowed, and incorporate in said transcript the following:

1. Petition to set aside conditions attached to an order of the Interstate Commerce Commission and Exhibits A and B thereto attached.
2. Answer of United States.

129 3. Answer of Interstate Commerce Commission.

4. Affidavit of W. H. Burns, introduced at hearing before the Court.
5. Findings of fact and conclusions of law by the District Court (filed July 31, 1939).
6. Opinion of the Court (filed July 31, 1939).
7. Final decree, filed July 21, 1939.
8. Petition for appeal.
9. Notice of appeal and acknowledgment of service.
10. Assignment of errors.
11. Order allowing appeal.
12. Notice to Attorney General of the State of Illinois.
13. Citation on appeal.
14. Statement of jurisdiction of Supreme Court, and Statement of Points to be Relied upon together with notice and acknowledgment of service.
15. Petition (filed August 28, 1939) for Order Staying final decree.
16. Plaintiffs' answer to petition for stay.
17. Order (filed August 28, 1939) staying final decree pending appeal.
18. Praecipe for transcript of record, and acknowledgment thereof.
19. Clerk's certificate.

Dated August 28, 1939.

WILLIAM J. CAMPBELL,
United States Attorney,
THURMAN ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.

130 DANIEL W. KNOWLTON,
E. M. REIDY,
For the Interstate Commerce Commission.

Service of the foregoing praecipe for transcript of record and the receipt of a copy thereof are hereby acknowledged this 28th day of August 1939.

W. F. PETER,
Attorney for Plaintiffs-Appellees.

131 [Clerk's certificate to foregoing transcript omitted in printing.]

132 [Citation in usual form showing service on W. F. Peter, filed August 28, 1939, omitted in printing.]

134 In Supreme Court of the United States

Statement of points to be relied upon and designation of the record to be printed

Filed August 31, 1939

Come now the appellants and say that they will rely upon the points made in their assignments of error in brief and oral argument before this Court on their appeal in the above-entitled cause.

Appellants further state that the entire record in this cause as filed in this Court is necessary for consideration of the points set forth above.

August 28, 1939.

NEWMAN A. TOWNSEND,
Acting Solicitor General,
WILLIAM J. CAMPBELL,
United States Attorney,

135 THURMAN ARNOLD,
Assistant Attorney General,
ELMER B. COLLINS,
Special Assistant to the Attorney General,
For the United States of America.
DANIEL W. KNOWLTON,
E. M. REDDY,
For the Interstate Commerce Commission.

Service of a copy of this statement of points to be relied upon and designation of the record to be printed is acknowledged this 28th day of August, 1939.

W. F. PETER,
Counsel for Appellees.

[File endorsement omitted.]

[Endorsement on cover:] Enter: Atorney General. File No. 43,750. N. Illinois D. C. U. S. Term No. 343. The United States of America and the Interstate Commerce Commission, Appellants vs. Frank O. Lowden, James E. Gorman, and Joseph B. Fleming, as Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company, etc. Filed August 31, 1939. Term No. 343 O. T. 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939